BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	CC Dkt. No. 96-115
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer	)	
Information	)	

REPLY COMMENTS ON PETITIONS FOR RECONSIDERATION

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ATTORNEYS FOR
TIME WARNER TELECOM INC.

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TABLE OF CONTENTS

PAGE

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REPLY COMMENTS ON PETITIONS FOR RECONSIDERATION

Time Warner Telecom[1] Inc. ("TWTelecom") by its attorneys, hereby files these "Reply Comments on Petitions for Reconsideration" to oppose the petitions filed by various parties to the extent they seek to eliminate or modify the Commission's rules with respect to use of customer proprietary network information ("CPNI") in customer "retention" or "win-back" campaigns.

I. THE COMMISSION SHOULD REJECT THE PETITIONS' REQUESTS TO ELIMINATE THE ANTI-WINBACK RULE.

Several petitions for reconsideration ("PFRs") ask the Commission to revisit its determination that section 222 prohibits carriers from using customer proprietary network information ("CPNI") to "retain" or "win-back" a customer or former customer -- the "anti-win-back rule". As a statutory and

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[1] Formerly Time Warner Communications Holdings Inc.

policy matter, it is imperative that the Commission reject the PFRs to the extent they seek reconsideration of the applicability of the anti-win-back rule to incumbent local exchange carriers ("ILECS").

Section 222(c)(1) states

> a telecommunications carrier . . . shall only use, disclose or permit access to individually identifiable customer proprietary network information in its *provision* of (A) the telecommunications service from which such information is derived . . . .[2]

In passing this section, Congress was concerned with balancing carrier competitive interests with customer privacy interests.[3] The section clearly contemplates use of CPNI only with respect to the provision of service, not in order to gain customer business already lost. In interpreting the section, the Commission stated that

> We also do not believe, contrary to the position suggested by AT&T, that Section 222(d)(1) permits the *former (or soon-to-be former)* carrier to use the CPNI of its former customer (*i.e.*, a customer that has placed an order for service from a competing provider) for 'customer retention' purposes.[4]

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[2] 47 U.S.C. § 222(c)(1) (emphasis added).

[3] Telecommunications Act of 1996, Conference Report, 4 U.S. Code & Cong. News 219 (1996) ("In general the new section 222 strives to balance both competitive and consumer privacy interests with respect to CPNI").

[4] Telecommunications Carriers' Use of Proprietary Network Information and Other Customer Information, CC Dkt. No. 96-115, *Second Report and Order, and Further Notice of Proposed Rulemaking*, slip op. at ¶ 85 (rel. Feb. 26, 1998) (emphasis added)(citation omitted) ("Second Report and Order").

The Commission concurred that a plain reading of the statute prohibited marketing to both former and soon-to-be former customers. TWTelecom agrees with this interpretation. The phrase "in its provision" clearly contemplates the use of only a current customer's CPNI by a telecommunications carrier. Even if the Commission were to find (incorrectly) that the statute is ambiguous, at a minimum the Commission's interpretation of section 222 is reasonable (unlike the interpretation permitting a more expansive use of CPNI proposed in the PFRs) and consistent with Congressional intent.

Thus, this section neither permits telecommunications carriers to use CPNI to retain customers (*i.e.*, market to customers that have switched, but have yet to be cut-over to the new carrier) through use of CPNI; nor to use CPNI to win-back customers (*i.e.*, market its service to former customers) who have switched to a competitive local exchange carrier ("CLEC").[5]

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[5] It should be noted that several petitions interpret the exceptions to section 222(c) (listed in section 222(d)) permitting ILECs to engage in retention and win-back campaigns. For example, GTE argues that Section 222(d) permits carriers to "render" service to customers, and hence to engage in win-back marketing to regain the customer. *See* GTE Petition at 33-35. This argument is simply not supported by the terms of the statute as explained by numerous commenters. *See, e.g.*, ALTS Opposition; KMC Telecom, Inc. Opposition; Focal Communications Corp. Opposition.

II. THE COMMISSION MAY NOT FORBEAR FROM APPLYING THE ANTI-WINBACK RULE TO THE ILECS.

Though there may be valid reasons for the Commission to forbear from applying the anti-win-back rule to carriers such as CLECs, wireless carriers, and interexchange carriers, that have won customers in a competitive market, the Commission may not do so with respect to ILECs for both statutory and policy reasons. First, for the Commission to forbear pursuant to section 10 from applying a valid rule or regulation, it must determine that (1) enforcement is not necessary to ensure reasonable and non-discriminatory rates; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[6] Lifting the anti-win-back rule's applicability to ILECs would result in decreased competition, unlawful use of private customer information, and would be contrary to the public interest. As is demonstrated below, the public interest element of section 10 is so clearly violated with respect to forbearance concerning ILECs that no further analysis is required.

TWTelecom agrees with the oppositions that argue that, as a policy matter, the unique and longstanding local market structure requires the enforcement of the anti-win-back rule with respect to ILECs.[7] Since the inception of local wireline service, the

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[6] *See* 47 U.S.C. § 160.

[7] *See, e.g.*, MCI Opposition; Sprint Opposition and Comments; KMC Telecom, Inc. Opposition; Focal Communications Corp. Opposition.

vast majority of access lines nationwide have been controlled by a protected monopoly which faces little or no competition. By way of this historical monopoly position, an ILEC was able to gather and collect useful information concerning its customers, including CPNI. In the newly competitive environment, an ILEC is able to gather information concerning competitive carriers. This historical monopoly (and current market dominance) gives rise to retention and win-back issues in three scenarios.

First, with respect to attempts to retain customers, ILECS should not be permitted to leverage their competitive advantage (the result of monopoly regulation, not superior service or lower prices) into an anticompetitive abuse by interfering with the customer switch-over process in order to retain a current customer. This problem is most pronounced due to the delicate nature of the customer switch-over process.[8]

Customers frequently attribute errors or difficulties in the switch-over process to the CLEC rather than to the ILEC.[9] Though the ILEC must be involved, to some extent, with any switch-over, the switch-over should be as mechanical as possible since the customer has already made its decision to establish service

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[8] *See, e.g.*, Commonwealth Telecom Services, Inc. Opposition at 4 ("This is a most vulnerable time in a new customer relationship . . .").

[9] *See, e.g., id.* at 5 ("If the service change-over is delayed for any reason, the customer sometimes blames the new carrier, and decides not to change service").

elsewhere.[10] The ILEC should not be permitted to exploit this opportunity and to use its superior CPNI to market to the customer and forestall competition. To do so would be anti-competitive with respect to other carriers.[11] Moreover, permitting such a practice would likely chill competitive entry into the market, resulting in less competition, and ultimately higher prices than otherwise would be realized.[12] This result is contrary to Congressional intent regarding the 1996 Act, and does not comport with the public interest standard of section 10.[13]

Second, no telecommunications carrier should be permitted to use what MCI describes as "carrier proprietary information" (*i.e.*, information gained from carrier-to-carrier relationships) in order to retain customers.[14] MCI notes that section 222(b)

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10 *See, e.g.*, Sprint Opposition and Comments at 4.

11 *See* MCI Opposition at 23-24.

12 *See, e.g.*, Commonwealth Telecom Services, Inc. at 11 ("The impact on the monopoly service provider of such 'lower prices' to a few customers is negligible. The anti-competitive impact on new entrants and market competition can be devastating.")

13 *See* MCI Opposition at 24 ("[l]ong-term development of local competition is the only sure protection for consumers.")

14 The problem of use of carrier proprietary information to win-back customers, which have established service with another provider, does not exist. This is because carrier proprietary information (*e.g.*, a CLEC request to purchase an unbundled loop to an existing ILEC customer) provides early notice that the customer intends to switch carriers, enabling the current carrier to attempt to preempt the switch. This danger does not exist in the context of regaining a customer which has already switched its service -- the original carrier learns of the switch once it has

may not be used by an underlying carrier for its own benefit (*e.g.*, to retain a customer). As MCI argues, an ILEC often gains advance notice of a customer's intention to switch to another carrier due to its capacity as the underlying facilities-based carrier. During the course of its dealings with the customer's new carrier, it becomes readily apparent (*e.g.*, due to the new carrier ordering an unbundled network element, or seeking to establish a resale relationship for that customer) to the ILEC that the new carrier has stolen one of the ILECs customers.[15] The Commission addressed the point in the Second Report and Order, noting that a section 201(b) violation for unreasonable and anticompetitive practices "may be shown in any number of contexts involving use or disclosure of customer information that unreasonably favors the incumbent LEC to the disadvantage of the competing LEC."[16] ILEC use of its bottleneck position, and the carrier proprietary information it derives therefrom, to preempt competition violates the section 201(b) standard.[17] This

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already occurred, and too late to preempt the switch and retain the customer.

15 *See* MCI Opposition at 17.

16 Second Report and *Order* at n.316.

17 The FCC has in the past relied upon section 201(b) specifically and Title II more generally as prohibiting incumbent LECs from leveraging their market power to harm their competitors. *See, e.g.*, Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs, CC Dkt Nos. 91-141; 92-222, *Report and Order and Notice of Proposed Rulemaking* at ¶¶ 199-203 (rel. Oct. 19, 1992); Expanded Interconnection with Local Telephone Company Facilities, CC

analysis applies equally to switch-overs from the ILEC to facilities-based carriers such as TWTelecom.[18]

Third, in the context of ILEC use of CPNI to win-back former customers, TWTelecom agrees with those oppositions that state that such a use of CPNI by ILECs would, contrary to several carriers' claims,[19] be antithetical to competition. TWTelecom, of course, supports the notion that ILECs should have an opportunity to contact former customers in order to re-establish a prior service relationship. Nevertheless, the ability to rely on CPNI gathered during its existence as a protected monopoly would enable a ILEC to compete by relying on information that in almost every case a CLEC simply does not and cannot have. Moreover, the knowledge that ILECs possess such valuable information will chill potential local entrants and thereby frustrate the realization of Congress' goal of competition in the local exchange.

Dkt. No. 91-141, *Second Memorandum Opinion and Order on Reconsideration* at ¶¶ 47-51 (rel. Sept. 2, 1993). The use of CPNI to retain customers that have decided to change carriers but have not yet been switched over to their newly selected carrier is a classic example of the behavior prohibited under section 201(b).

18 A facilities-based CLEC must issue a local service request ("LSR") to the incumbent in order to port a customer's number. This LSR, *inter alia*, provides the incumbent with advance notice of the identity of the customer and the carrier which the customer has selected. In the interim between issuance of the LSR and the actual service switch-over, the incumbent may use this information to impede the service conversion.

19 *See, e.g.*, Bell Atlantic Mobile Comments; BellSouth Comments; SBC Comments.

Finally, TWTelecom agrees with MCI's position that an ILEC must not be permitted to exploit its monopoly position if the ILEC learned of a change, or intended change, first from the customer rather than from its position as an ILEC through its interactions with another carrier.[20]

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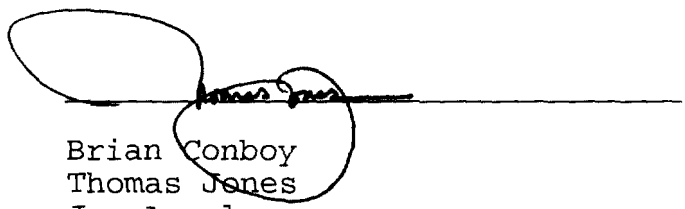
[20] *See* MCI Opposition at 19-20.

III. CONCLUSION.

For the reasons stated above, TWTelecom requests that the Commission deny the PFRs to the extent they seek to enable ILECs to rely on CPNI or carrier proprietary information to retain or win-back customers or former customers.

Respectfully submitted,



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